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## THE SHERMAN OR ANTI-TRUST ACT

"The Sherman Act," so-called, from the name of the distinguished Senator from Ohio,—John Sherman,—by whom it was introduced into Congress, was passed July 2, 1890, and has been in force more than eighteen years. Its provisions concisely stated are these:

It is entitled: "An Act to protect trade and commerce against unlawful restraints and monopolies."

The first section provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

The second section provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."

The third section practically extends the provisions of sections one and two to trade and commerce in any Territory or in the District of Columbia, or between any Territory and any State or States, or the District of Columbia, or with foreign nations.

The three sections each provide that "Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

The fourth section invests the several Circuit Courts of the United States with "jurisdiction to prevent and restrain violations" of the Act, with power to issue injunctions, and the fifth section provides that the Court may summon any party, whether resident in the district where the Court is held or not, to appear in any pending suit.

Section six provides that "Any property owned under any contract or by any combination, or pursuant to any conspiracy mentioned in section one of this Act, and being in the course of transportation from one State to another, or to a foreign

country, shall be forfeited to the United States, and may be seized and condemned as such."

The seventh section provides that "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in the Circuit Court of the United States without respect to the amount in controversy, and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The Act also specifically provides that "It shall be the duty of the several District Attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain 'violations' of the Act."<sup>1</sup>

The following Acts have been since passed to aid the enforcement of the Sherman Act:

February 11, 1903, Congress passed an Act to "expedite the hearing and determination of suits in equity pending or thereafter brought" under the Sherman Act, which provided that the Attorney General might file in any such suit "a certificate that in his opinion the case is of general public importance," and that "thereupon such case shall be given precedence over others, and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three Circuit Judges of the Circuit, if there be three or more, and if not more than two, then before them and such District Judge as they may select."<sup>2</sup>

This Act, which has recently been sustained by the three Circuit Judges of the First Circuit, gives the Attorney General peculiar power to press the prosecution of suits under the Sherman Act.

February 25, 1903, Congress made a special appropriation of five hundred thousand dollars, to be expended under the direction of the Attorney General in the employment of special counsel and agents to conduct proceedings, suits and prosecutions under the Sher-

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<sup>1</sup> *U. S. Compiled Statutes*, 1901, pp. 3200, *et seq.*

In the Wilson Tariff Act, which became a law August 27, 1894, without the approval of President Cleveland, the provisions of the Sherman Act were practically reenacted as applicable, particularly to imports from any foreign country. And in the Dingley Tariff Act, approved July 24, 1907, it was provided that nothing therein should be construed to repeal or in any manner affect these provisions of the Wilson Tariff Act.

<sup>2</sup> Supplement to *U. S. Compiled Statutes*, 1903, p. 376.

man Act and under the Interstate Commerce Act. The same Act also provided that "No person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said Act."

March 3, 1903, Congress authorized the President to appoint an assistant to the Attorney General with a salary of \$7,000 per annum, and an assistant to the Attorney General with a salary of \$5,000 per annum, and to appoint and employ, without reference to the rules and regulations of the Civil Service, two confidential clerks at a salary of \$1,600 each per annum, to aid in the enforcement of these Acts, and to be paid from the special appropriation therefor.<sup>3</sup>

Numerous bills have been introduced into Congress to modify or repeal the provisions of the Sherman Act, but none of them have been passed, and its sweeping provisions have remained and are now in full force.

The Act is plain and explicit in its language, and the Supreme Court of the United States has held that it means what it says.

They have wisely declined to limit the effect of the Act by importing into it any judicial qualification of its language. When it was claimed that railroads were not subject to the Act, the Court said: The Act is directed against every combination. If Congress had intended to exclude railroads, it is to be presumed it would have said so. As it has not, we must hold that the Act applies to railroads.

When it was urged that the Act was only directed against unreasonable combinations, or acts which caused an unreasonable restraint of interstate commerce, the Court said: If Congress had intended that the Act should apply only to such combinations as the Court might find to be *unreasonable*, it might, and doubtless would, have said so. It has not qualified the plain meaning of "every combination" by the word "reasonable," and therefore we must hold, not only that the Act applies to every combination, but that it applies to every combination, whether reasonable or unreasonable.

When it was urged that the Act ought not to be held to restrain combinations of laborers acting in the interests of laborers, the Court said: The Act makes no distinction between classes,

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<sup>3</sup> *U. S. Compiled Statutes*, Sup. 1903, pp. 366 and 367.

but applies to every combination of persons including organizations of laborers.

In like manner, when it has been urged that the Act does not apply to a combination affecting only a part of interstate commerce, the Court has looked to the language of the Act, and finding that it says: "Every person who shall monopolize or combine to monopolize any part of the trade and commerce," &c., "shall be guilty of a misdemeanor," has said that if Congress had intended that the Act should apply only to combinations which cover all or a large part of a given subject of interstate commerce, it would have said so, and as it did not, it must be assumed that Congress meant what it said, and that a combination in restraint of *any part* of interstate commerce, whether *reasonable* or *unreasonable*, is contrary to the plain terms of the Act.

The effect of the Act as thus construed is stated by Circuit Judge Lacombe, in his opinion in *United States v. The American Tobacco Company*, given November 7, 1908, as follows:

"Disregarding various dicta and following the several propositions which have been approved by successive majorities of the Supreme Court, this language is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition and thus tend to deprive the country of the services of any number of independent dealers, however small."

And he added:

"As thus construed the statute is revolutionary. \* \* \* \* Every aggregation of individuals or corporations, formerly independent, immediately upon its formation terminates an existing competition, whether or not some other competition may subsequently arise. The Act, as above construed, prohibits every contract or combination in restraint of competition. Size is not made the test. Two individuals who have been driving rival express wagons between villages in two contiguous States, who enter into a combination to join forces and operate a single line restrain an existing competition, and it would seem to make little difference whether they make such combination more effective by forming a partnership or not."

The learned judge might have added an even stronger illustration, which would have been equally within the Act, as construed by the Supreme Court, like this:

Suppose two proprietors of rival stage lines between two points ten miles apart, one in one State, and the other in another, each running four round trips between the two points daily, and each charging the same price, and therefore not competing in charges

but only in efficiency of service. Suppose these proprietors find, owing to increase in the wages of their employees and in the price of hay and grain, and in expense of repairs of stages, harnesses, &c., they are each losing money, and they meet and agree to discontinue one of the daily round trips, so that at the rate charged by each alike they will cease to lose money in running the stages. If they do this and nothing more, they have both restrained the competition previously existing between them in this interstate transportation, and are criminals subject to indictment and fine, and their property which they use in their business is liable to seizure and confiscation under the Act. More than this, if instead of making an agreement to restrict service or production, they enter into a partnership putting their properties together and working them for common profit or loss, they are, as suggested by Judge Lacombe, equally violating the Sherman Act, and subject to civil suits to break up their partnerships, and to indictment and fine, and to confiscation of their property.

Such is the Sherman Act, as construed by the Supreme Court, and such is the machinery which Congress has provided for its efficient enforcement. How has it been enforced?

The following are all the suits in equity which have been brought under it by the Attorney General up to January 1, 1909:

September 25, 1890, suit was brought against *Jellico Mountain Coal Company et al.*, in the Circuit Court for the Middle District of Tennessee, to restrain a combination of coal mining companies and dealers in coal formed for the purpose of fixing prices and regulating the output of coal in Kentucky and Tennessee. The combination was held to be in violation of the Sherman Act, and enjoined, but the case did not go to the Supreme Court.<sup>4</sup>

January 6, 1892, a suit was brought against *Trans-Missouri Freight Association et al.*, in the Circuit Court for the District of Kansas, to restrain a combination of railroads formed for the purpose of maintaining rates and preventing discrimination. This bill was dismissed by decree of the Circuit Court, and the decree was affirmed by the Circuit Court of Appeals. The Supreme Court, however, reversed the decree, and held that the Sherman Act not only applied to railroad carriers, which had been denied, but that it embraced all combinations in restraint of trade and commerce among the several States and with foreign nations, whether the restraint was reasonable or unreasonable.<sup>5</sup>

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<sup>4</sup> 13 Fed. Rep. 898; 46 Fed. Rep. 432.

<sup>5</sup> 53 Fed. Rep. 440; 58 Fed. Rep. 58; 166 U. S. 290.

November 10, 1892, suit was brought against *Workingmen's Amalgamated Council of New Orleans and others*, in the Circuit Court for the Eastern District of Louisiana, to restrain a combination of workingmen from interference with interstate and foreign commerce. The Court held that the Sherman Act applied to combinations of laborers, issued an injunction and the Circuit Court of Appeals affirmed the decree.<sup>6</sup>

May 2, 1892, a suit was brought against *E. C. Knight Company et al.*, popularly known as the "Sugar Trust case," in the Circuit Court for the Eastern District of Pennsylvania, to enjoin the American Sugar Refining Company, a New Jersey corporation, from acquiring the stock of certain Pennsylvania corporations engaged in refining and selling sugar. The Circuit Court entered a decree dismissing the bill, which was affirmed by the Circuit Court of Appeals. The case then went to the Supreme Court, by which the decree dismissing the bill was affirmed upon the ground that the acts complained of were wholly within one State and "bore no direct relation to commerce between the States or with foreign nations."<sup>7</sup>

These suits were all the civil suits brought by the Attorney General under the Sherman Act during the administration of President Harrison, from the time the Act was approved by him on July, 1890, until March 4, 1893, when President Harrison was succeeded by President Cleveland.

In July, 1894, suits were brought in the Circuit Court for the Districts of Missouri, Indiana and Illinois, known as the "Debs" cases, to enjoin Debs and others of the American Railway Union from interfering with interstate commerce and obstructing the mails in violation of the Sherman Act, in connection with the strike against Pullman Palace Car Company. The Courts held that the Sherman Act applied to such combinations and issued injunctions which were practically disregarded by the persons against whom they were issued.

January 8, 1896, a suit was brought in the Circuit Court for the Southern District of New York, to enjoin a combination engaged in transportation between Chicago and the Atlantic coast, (known as the "Joint Traffic Association,") to control competitive traffic. The Circuit Court entered a decree dismissing the bill and the Court of Appeals affirmed the decree, but the decree was

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<sup>6</sup> 54 Fed. Rep. 994; 57 Fed. Rep. 85.

<sup>7</sup> 60 Fed. Rep. 306. 934; 156 U. S. 1.

reversed by the Supreme Court upon the authority of *United States v. Trans-Missouri Freight Association*, above referred to.<sup>8</sup>

December 31, 1896, a suit was brought against *Hopkins et al.*, in the Circuit Court for the District of Kansas, to restrain the operations of the "Kansas City Live Stock Exchange." The Circuit Court issued an injunction, but the Supreme Court reversed the decree upon the ground that the business of the Exchange did not constitute interstate commerce.<sup>9</sup>

December 10, 1896, a suit was brought against *Addyston Pipe and Steel Company*, in the Circuit Court for the Eastern District of Tennessee, to enjoin a combination of manufacturers and dealers in iron pipe, for the purpose of controlling the manufacture and sale thereof. The Circuit Court dismissed the suit, but the Circuit Court of Appeals reversed the decree of the Circuit Court, and directed a decree to be entered for the United States. Upon appeal the decree entered by direction of the Circuit Court of Appeals was affirmed by the Supreme Court.<sup>10</sup>

These were all the suits in equity brought by the Attorney General during the four years of President Cleveland's second administration from March 4, 1893, to March, 4, 1897.

During the administration of President McKinley from March 4, 1897, to September 14, 1901, three such suits were brought.

June 7, 1897, a suit was brought against *Anderson and others*, in the Circuit Court for the Western District of Missouri, to restrain the operations of the "Traders' Stock Exchange," an association engaged in buying cattle on the market. The Circuit Court issued a temporary injunction, and the case went to the Circuit Court of Appeals, where it was certified to the Supreme Court for instructions upon certain questions. The Supreme Court reversed the decree of the Circuit Court, and directed the bill to be dismissed upon the ground that the operations of the association were not an interference with interstate commerce.<sup>11</sup>

December 16, 1897, a suit was brought in the Circuit Court for the Northern District of California, to restrain the operations of a combination of coal dealers known as the "Coal Dealers' Association of California." A restraining injunction was granted and no appeal taken.<sup>12</sup>

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<sup>8</sup> 76 Fed. Rep. 895; 89 Fed. Rep. 1020; 171 U. S. 505.

<sup>9</sup> 82 Fed. Rep. 529; 84 Fed. Rep. 1018; 171 U. S. 578.

<sup>10</sup> 78 Fed. Rep. 712; 85 Fed. Rep. 271; 175 U. S. 211.

<sup>11</sup> 82 Fed. Rep. 998; 171 U. S. 604.

<sup>12</sup> 85 Fed. Rep. 252.



May 8, 1899, a suit was brought against *Chesapeake and Ohio Fuel Company et al.*, in the Circuit Court for the Southern District of Ohio, to restrain a combination of producers and shippers of coal in Ohio and West Virginia. The Circuit Court made a decree declaring the combination illegal, which was affirmed by the Circuit Court of Appeals, and no appeal to the Supreme Court was taken.<sup>13</sup>

These three cases were all the suits in equity that were brought by the Attorney General under the Sherman Act from March 4, 1897, to September 14, 1901, the beginning of President Roosevelt's administration.

March 10, 1902, a suit was brought in the Circuit Court for the District of Minnesota, to enjoin the Northern Securities Company, a corporation of New Jersey, from acquiring, holding, voting or acting as the owner of shares of the Great Northern Railway Company and the Northern Pacific Railway Company, and thus restraining interstate competition between the two railroads. The Circuit Court entered a decree in favor of the government, and under the provisions of the "Expediting Act," so-called, passed February 11, 1903, the case went directly to the Supreme Court for review. That Court affirmed the decree of the Circuit Court on the ground that the Securities Company was only a means employed by the owners of the two railroads to prevent competition in interstate commerce.<sup>14</sup>

May 10, 1902, a suit was brought against *Swift and Company and others*, in the Circuit Court for the Northern District of Illinois, to restrain the defendants, commonly known as the "Beef Trust," and various railroad companies from the suppression of interstate competition in the purchase of live stock and selling of dressed meats. The Circuit Court entered a decree May 26, 1903, in favor of the government, enjoining the further operations of the Trust. January 30, 1905, the Supreme Court affirmed the decree.<sup>15</sup>

October 15, 1902, suit was brought against the *Federal Salt Company and others*, known as the "Salt Trust," in the Circuit Court for the Northern District of California, to suppress competition in the manufacture and sale of salt in the States west of the Rocky Mountains. November 10, 1902, an injunction re-

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<sup>13</sup> 105 Fed. Rep. 93; 115 Fed. Rep. 610.

<sup>14</sup> 120 Fed. Rep. 721; 193 U. S. 197.

<sup>15</sup> 122 Fed. Rep. 529; 196 U. S. 375.

straining the combination was entered by the Circuit Court, and no appeal was taken therefrom.

September 12, 1903, suit was brought against *Jacksonville Wholesale Grocers' Association*, in the Circuit Court for the Southern District of Florida, to dissolve a combination of grocers, alleged to be conducting business in restraint of interstate commerce. November 1, 1907, the case was dismissed.

December 27, 1904, suit was brought in the Circuit Court for the District of Minnesota, against *General Paper Company* and twenty-three other corporations engaged in the manufacture and sale of paper, alleging that they had entered into a combination to control, regulate, monopolize and restrain interstate commerce in the manufacture and sale of different kinds of paper and products of paper. May 11, 1906, the Circuit Court made a decree dissolving the combination.

In October, 1905, suit was brought against *Metropolitan Meat Company and others*, in the Circuit Court for the District of Hawaii, to restrain combination in restraint of trade in beef and beef products. A demurrer to the bill was overruled, and the case is still pending.

October, 1905, suit was brought against *Allen and Robinson and others*, in the Circuit Court for the District of Hawaii, to restrain a combination to control the lumber trade in the territory, and the case is still pending.

November 4, 1905, suit was brought against *Nome Retail Grocers' Association* of Alaska, to restrain a combination to fix prices and suppress competition in the sale of groceries, and a decree was entered by consent of the defendants dissolving the combination.

December 1, 1905, suit was brought against *The Terminal Railroad Association of St. Louis and others*, in the Circuit Court for the Eastern District of Missouri, to restrain the Terminal Association, the bridge companies and the railroads and ferries crossing the Mississippi River at St. Louis, from combining to operate the two bridges as a common agency of interstate commerce, and to suppress competition between the bridges and between the bridges and ferries, and to monopolize interstate transportation at that point. This case is still pending.

March 7, 1906, suit was brought against *Otis Elevator Company and others*, in the Circuit Court for the Northern District of California, to restrain a combination in the manufacture and

sale of elevators, and June 1, 1906, a decree was entered by consent dissolving the combination.

May 9, 1906, suit was brought against *National Association of Retail Druggists and others*, in the Circuit Court for the District of Indiana, to enjoin a combination in restraint of interstate trade and commerce in the sale of drugs and proprietary medicines, and May 9, 1907, a final decree was entered by agreement in favor of the government.

November 15, 1906, suit was brought against *Standard Oil Company and others*, in the Circuit Court for the Eastern District of Missouri, to enjoin a combination in restraint of the manufacture and sale of petroleum, which is still pending, being the famous Standard Oil case, in which it is said, more testimony has been taken than in any other case ever brought in the United States.

March 12, 1907, suit was brought against *American Seating Company and others*, in the Circuit Court for the Northern District of Illinois, to restrain a combination in the manufacture and sale of school and church furniture, and August 15, 1907, a decree in favor of the government against most of the defendants was entered, from which no appeal has been taken.

June 12, 1907, suit was brought against *The Reading Company and others*, in the Circuit Court for the Eastern District of Pennsylvania, to dissolve a combination between the anthracite coal-carrying roads and others, which is still pending.

July 10, 1907, suit was brought against *American Tobacco Company and others*, in the Circuit Court for the Southern District of New York, to restrain a combination in restraint of trade in the manufacture and sale of tobacco. November 7, 1908, the Circuit Court rendered a decree restraining the combination, and the case has gone by appeal to the Supreme Court.

July 30, 1907, suit was brought against *E. I. du Pont de Nemours and others*, in the Circuit Court for the District of Delaware, to restrain a combination in restraint of trade in the manufacture and sale of gunpowder and other high explosives, which is still pending.

February 1, 1908, a suit was brought in the Circuit Court for the District of Utah, against the *Union Pacific Railroad Company and others*, to restrain a combination between the defendant railroad companies to suppress interstate commerce, which case is still pending.

May 22, 1908, suit was brought in the Circuit Court for the District of Massachusetts, against the *New York, New Haven and Hartford Railroad Company and others*, charging the New Haven Company with combining and attempting to combine under one common control various competing railroad and electric railway systems in New England, which case is still pending.

When the Sherman Act was passed it was well understood that it applied to combinations of labor as well as to combinations of capital. When the Act was under consideration an amendment was adopted in the Senate as follows:

*"Provided, that this Act shall not be construed to apply to any arrangements, agreements or combinations between laborers, made with the view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations or combinations among persons engaged in horticulture or agriculture, made with a view to enhancing the price of their own agricultural or horticultural products."*

The objection to this amendment was thus stated in debate by Senator Edmunds:

*"The fact is that this matter of capital, as it is called, of business and of labor, is an equation, and you cannot disturb one side of the equation without disturbing the other. If it costs for labor 50 per cent more to produce a ton of iron, that 50 per cent more goes into what that iron must sell for, or some part of it. I take it everybody will agree to that. . . . Neither speeches nor laws nor judgments of courts nor anything else can change it, and therefore, I say, to provide on one side of that equation that there may be combinations, and on the other side that there shall not, is contrary to the very inherent principle upon which such business must depend. If we are to have equality, as we ought to have, if the combination on the one side is to be prohibited, the combination on the other side must be prohibited, or there will be destruction in the end."*

The amendment was abandoned after this statement and the law passed as applicable to "every combination," whether of capital or labor. Bills to exempt combinations of laborers from the provisions of the Act have repeatedly been introduced into Congress, but none have been passed.

There have, however, been no suits in equity by the Attorney General to enforce the Act against combinations of labor, except in the case of *United States v. Workingmen's Amalgamated Council of New Orleans and others*, brought in the Circuit Court for the Eastern District of Louisiana, in November, 1892, and in the so-called "Debs cases," brought in 1894.

In all these early cases the Courts held that the law was applicable to combinations of workmen, and yet since that time, for a period of about fourteen years, the Attorney General has not brought a single suit in equity against combinations of laborers, though in the "Danbury Hat case," so-called, (*Lowe v. Lawlor*, 208 U. S. 274) decided by the Supreme Court, February 3, 1908, and in some other cases, private parties have successfully sought the protection of this law against labor combinations.

It thus appears that from July 2, 1890, the date of the passage of the Sherman Act, until January 1, 1909, a period of over eighteen years, only eighteen suits in equity were instituted by the Attorney General, and that only eleven of these have been finally maintained. During the year 1908, only two such suits were brought, one in February against the Union Pacific Railroad Company, and one in May against the New York, New Haven and Hartford Railroad Company. During the seven months from May, 1908, until January 1, 1909, no suit whatever was brought by the Attorney General under the Act in the discharge of his statutory duty to cause such suits to be brought.

But the Act makes the violation of it a crime which it is the duty of the law officers of the government to cause to be punished by criminal proceedings. During the period above referred to, only twenty-five indictments for alleged violations of the Act have been found, and only eight convictions have been obtained.

It is idle to say that this has been an efficient enforcement of the law, although it may, perhaps, be claimed that for the first part of the time during which the law has existed, cases brought under it were in the nature of test cases, and that it was proper that the construction of the statute by the Courts should be ascertained by decisions in such cases before there was a general attempt to enforce it against everybody who violated it.

This, however, cannot be said of the years since the construction of the statute has been established by the opinions of the Supreme Court.

All the Attorneys General of the United States since the Sherman Act went into effect have been able men and eminent lawyers, trained to the highest degree of efficiency in the practice of the law. They have had ample pecuniary resources at their command. Congress has gone to the limit of its constitutional power as to judicial proceedings in the enactment of the "Expediting Act," and other laws designed to aid the Attorney General in the enforcement of the Sherman Act.

It is to be assumed that all these competent lawyers have used the ample means at their command, and have exercised all the extraordinary powers which have been given to them, in an earnest endeavor to fully perform the duty imposed upon them by the Sherman Act to enforce its provisions. Of course they have not been able to prosecute every violation of the Act. All the resources of the United States would not be sufficient to prosecute all persons who have been or are now violating the Act. If the Attorney General should attempt to sue everybody who is acting contrary to the provisions of the Act, he would need a large corps of detectives, agents, clerks and special counsel in every State in the Union. If he brought suits against all who are liable to suit under the Act, and then caused the cases to be given precedence over all other cases in the Circuit Courts, and each to be heard by three Circuit Judges under the "Expediting Act," the Courts would not only be practically unable to hear any other cases, but unable even to hear and determine all these cases, within any reasonable time .

But when Congress by the Sherman Act, made it the duty of the Attorney General to enforce its provisions by suits in equity against those who violated it, Congress plainly meant that the Attorney General should thus enforce it uniformly and against all who might violate it. It did not mean that he should have "power to bind and to loose," and to use the power of the government against some violators of the Act, and not against others equally violating it.

And yet that is what has been done. Examination of the suits referred to above, which have been brought by the Attorney General, shows that he has not thus enforced the law uniformly, even as against the large combinations, in restraint of interstate commerce, popularly known as "Trusts."

The Drug Trust, the Power Trust, the Cordage Trust, the Whiskey Trust, the Rubber Trust, the Watch Trust, the Barb Fence-Wire Trust, the Steel Trust, the Cotton-Seed Oil Trust, the Shoe Machinery Trust, the National Bank or Trust Company combinations, and most of the other large combinations of capital which monopolize and control many of the large commercial and business interests of the country, directly restraining and monopolizing interstate commerce, have not been disturbed in their conduct by any action by the Attorney General.

The eminent men who have been Attorneys General have

doubtless all intended to act fairly and justly. None of them have intended to discriminate unfairly between the violators of the Act, least of all have any of them intended to use the great power conferred upon them by Congress in this Act for any partisan or political end.

But the magnitude of the task imposed upon them has practically compelled them to discriminate in the discharge of their duty, and this has laid them open to the charge that they have discriminated unfairly and from improper motives.

The sweeping provisions of the Act itself have practically caused this result, and compelled a single Cabinet Officer to distinguish and discriminate between those who violate the law. The recent communication of the President in answer to the resolution of the Senate, asking why the Attorney General had not proceeded against the Steel Trust, illustrates this. Stripped of all verbiage, the President's reply to the Senate is that the Attorney General has not proceeded against the Steel Trust because the President told him not to do it, and the Chief Magistrate adds, apparently oblivious to the fact that the Sherman Act makes it the duty of the Attorney General to enforce the law, whether the President directs him to do it or not, that it is none of the business of the Senate why the law is or is not enforced by the Attorney General in particular cases.

It is doubtless true that the enforcement of the Sherman Act is confided to the sound discretion of the Executive Department, and specifically by the Act itself to the discretion of the Attorney General, and that Congress cannot control that discretion except by the enactment of a new statute. The President is doubtless right when he says that Congress cannot properly ask of him, or of any member of the Cabinet, the *reasons* why they do not discharge their executive duties differently. Neither the President, nor any other executive officer can be required by Congress to do more than give information as to what he does in the discharge of his executive duties.

But the very fact that the execution of the Sherman Act lies within the discretion of the Attorney General, with no statutory standard or guide for his discretionary action, has made the Act as applied to its subject matter, a menace to the business interests of the country. The provisions of the Act are so broad, and the violations of it so numerous, that it is impossible for the Attorney General to enforce it uniformly against all who violate it. It is

discretionary with him as to whom he will prosecute. Those who are prosecuted can have their rights under the Act adjudicated, so that they may understandingly shape their business to meet its requirements, if possible. But everybody else is necessarily in a state of doubt or uncertainty. Nobody knows how long the Attorney General in his discretion will permit him to go on with his business, which may be said to be contrary to the provisions of the Act.

It is obvious that to enforce the Act against everybody, so that no part of any competition in interstate commerce shall be restrained by any conduct of anybody, would practically bring the business of the country to a standstill. Interstate commerce as defined by the Supreme Court, comprehends much the larger part of all the business done by the people of the United States, and any law which controls the conduct of that business necessarily practically controls the conduct of all other business.

Not the least vice of the Act is that it is so sweeping in its provisions that it cannot be enforced against everybody uniformly, and that the question of selecting the particular persons against whom the Act is to be enforced is confided to the uncontrolled discretion of a single executive officer. It may be that this discretion has always been exercised fairly and without reference to political or personal considerations. It is claimed by many, however, and has been repeatedly and publicly charged, that this discretion has been, in some cases, exercised for political and personal reasons. An examination of the cases in which the Attorney General has exercised this discretion by prosecutions to enforce the Act, and knowledge of the character of the numerous combinations claimed to be in violation of the Act which have not been prosecuted, is required to ascertain whether this charge has any foundation in fact.

It was long ago said by the Chairman of the Interstate Commerce Commission, probably as competent to express an opinion upon the matter as anybody in the United States, that the Sherman Act was in his opinion, "the most mischievous piece of legislation in the history of the country." There is undoubtedly a growing demand by the business interests of the country that it should be essentially modified or repealed though the Senate Judiciary Committee has just declared it to be "in every respect a model law."

The President has several times recommended to Congress



that the Act should be so amended as to prohibit only such restraint of competition "as does harm to the general public."

At the last session of Congress, a bill was introduced by Mr. Hepburn and hence known as the "Hepburn Bill," to carry out the President's recommendation. The testimony taken upon it by the Committee on the Judiciary was printed and fills a quarto volume of 750 closely printed pages. This bill proposed in brief that the question of whether "a contract or combination is in unreasonable restraint" of interstate commerce, should be left to the judgment of the Commissioner of Corporations, to be decided with or without a hearing within thirty days after the filing of the contract with him.

Of this bill it can well be said that the remedy proposed by it is worse than the disease. It attempts to vest in a single executive officer the power to say what business arrangements, contracts or combinations with regard to interstate commerce are to be permitted and what are not to be permitted. It is obvious that this question can be decided only by knowing the subject matter to which each contract applies, so as to be able to determine what is likely to be done under the contract. Each case to be properly decided would require a hearing and an intelligent and deliberate determination of the question. Nothing short of this would justify anybody in acting upon the decision of the Commissioner.

The bill puts the larger part of the business interests of the country under the direct supervision and control of the Federal Commissioner of Corporations, something which the business men of the country could not and would not tolerate. It would be absolutely impossible for the Commissioner to discharge such duties. It is estimated by Mr. Washburn, member of Congress from Massachusetts, who is a business man of large experience, and has made a careful study of this matter, that in Massachusetts alone, upwards of five thousand business corporations are engaged in interstate business, many of which, he says, "doubtless have been and very likely are now, members of combinations in violation of the Sherman Act."

If all these corporations and all partnerships and private persons engaged in similar business, and belonging, or desiring to belong, to similar combinations were to file their contracts with the Commissioner of Corporations, it would be beyond his physical and mental power to deal intelligently with these contracts from a single State. If the persons and corporations in

like condition in all the States were to file their contracts with the Commissioner under the proposed Act, it would be impossible for him to deal with them all within the time required by the Act even if he used stamping machines by which he could stamp "approved" or "disapproved" upon the papers without reading them. Nothing could more forcibly show the evils of the Sherman Act than the fact that sensible and experienced men seriously propose to avoid these evils by such an absurd and impracticable remedy.

The fact is that the reason why the Sherman Act has not been efficiently enforced is because it is an unenforceable statute. It is as useless to attempt to enforce it generally and uniformly, according to its plain provisions, as it would be to attempt to enforce a statute regulating the price of commodities or the intrinsic value of money. The Act is an attempt to control commercial and economic forces by statute, and like all similar Acts, must ultimately either fall into entire disuse, or be repealed, after having caused, as such statutes always do, more or less injury to the community.

The remedy for the evils of the Act is not in providing cumbersome, mischievous and unworkable methods for avoiding some of them, but by substituting for it, so far as the public welfare requires, a properly framed, guarded and workable Act, with proper provisions for its efficient and uniform enforcement.

*J. H. Benton.*